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Sime Darby Holdings Bhd v Shahul Hamid bin Moideen

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–2069 OF 2011
LIM YEE LAN, DAVID WONG AND ROHANA YUSUF JJCA
3 SEPTEMBER 2013

Companies and Corporations — Shares — Option to purchase shares — Option scheme to employees to subscribe for shares ('ESOS') — Employee retired from company after exercising full option during first year of five year ESOS and before second year of scheme commenced — ESOS by law disentitled retired employee from further participation in scheme — Company's option committee rejected ex-employee's request to continue to exercise remaining options under ESOS — Whether High Court wrong to have held ex-employee suffered 'loss of opportunity' when denied further participation in scheme — Whether ex-employee failed to show there were strong grounds for company's board of directors to overrule option committee's decision

The respondent was deputy general manager of Golden Hope Plantations Bhd ('Golden Hope') — Golden Hope was subsequently acquired by the appellant — when he retired from its employment on 10 November 2006. Golden Hope had allowed its employees an option to subscribe for shares in the company under several share option schemes ('ESOS'). The respondent participated in one of the schemes ('ESOS3') and was granted an option to subscribe for 150,000 shares over a period of five years commencing from 8 December 2005. During the first of the five-year period, ending on 7 December 2006, the respondent exercised his option and was allotted 30,000 shares which was the maximum allowable to him in any one year of the five-year period pursuant to by law 8.2(b) of ESOS3. In April 2007, after his retirement, the respondent wrote to Golden Hope's option committee to permit him to exercise the remaining options under ESOS3 in full ie to subscribe for the remaining 120,000 shares. The option committee rejected the request, ruling that his retirement disentitled him from further participation in ESOS3 pursuant to by law 15.2 which provided, inter alia, that if a grantee of shares ceased to be employed before the full exercise of an option, such option or the balance thereof, as the case might be, forthwith ceased to be valid and no claim could lie against the company. The respondent appealed to the company's board of directors ('BOD') against the option committee's decision but the appeal was not heard. The High Court allowed the respondent's claim for damages to be assessed holding, inter alia, that he suffered 'loss of opportunity' when he was refused further participation in ESOS3 and that he might have succeeded in his appeal against the decision of the option committee had the BOD heard it. The instant appeal was against the High Court's decision.

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Held, allowing the appeal and setting aside the decision of the High Court:

(1) Giving the words in by laws 8.2(b) and 15.2 their plain and natural meaning, the respondent by virtue of his retirement and having exercised his full entitlement in the first year of the five-year scheme had no further right to participate in ESOS3. Any application to further participate was subject to the absolute discretion of the option committee, whose discretion could not be challenged. It was undisputed that the respondent had retired prior to the commencement of the second year of the five-year ESOS3 (see paras 16 & 21).

(2) Even if the BOD had heard the respondent's appeal, the BOD had to consider and be bound by the plain words of the by laws. The respondent had to show to the court that there were strong grounds that the BOD would have differed from the decision of the option committee. However, except for bare allegations of discrimination, the respondent failed to discharge the burden of proving that he had a real and substantial chance of success in his appeal to the BOD (see para 21).

[Bahasa Malaysia summary

Responden adalah timbalan pengurus besar Golden Hope Plantations Bhd ('Golden Hope') — Golden Hope kemudiannya diambil alih oleh perayu — apabila dia bersara daripada pekerjaannya pada 10 November 2006. Golden Hope telah membenarkan pekerja-pekerjanya opsyen untuk bersetuju membeli saham-aham di dalam syarikat di bawah beberapa skim opsyen saham ('ESOS'). Responden menyertai dalam salah satu skim ('ESOS3') dan diberikan opsyen untuk membeli 150,000 saham dalam tempoh lima tahun bermula dari 8 Disember 2005. Semasa tahun pertama daripada tempoh lima tahun tersebut, tamat pada 7 Disember 2006, responden melaksanakan opsyennya dan diumpukkan 30,000 saham yang mana adalah setakat maksimum yang dibenarkan kepadanya dalam mana-mana tempoh satu tahun daripada lima tahun tersebut berikutan undang-undang kecil 8.2(b) ESOS3. Pada April 2007, selepas persaraannya, responden menulis kepada ahli jawatankuasa opsyen Golden Hope untuk mengizinkannya melaksanakan opsyen yang tinggal di bawah ESOS3 sepenuhnya iaitu untuk membeli saham yang tinggal sebanyak 120,000. Ahli jawatankuasa opsyen menolak permintaan tersebut, memerintahkan bahawa persaraannya tidak memberikan dia hak daripada penyertaan selanjutnya dalam ESOS3 berikutan undang-undang kecil 15.2 yang memperuntukkan, antara lain, bahawa jika penerima saham tidak lagi bekerja sebelum pelaksanaan penuh opsyen, opsyen sedemikian atau bakinya, seperti mungkin dalam kes, dengan serta merta berhenti menjadi sah dan tiada tuntutan boleh dibuat terhadap syarikat. Responden merayu kepada lembaga pengarah ('LP') terhadap keputusan ahli jawatankuasa opsyen tetapi rayuan tidak didengar. Mahkamah Tinggi membenarkan tuntutan responden untuk ganti rugi ditaksir memutuskan, antara lain, yang dia mengalami 'loss of opportunity' apabila dia ditolak

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daripada penyertaan lanjut dalam ESOS3 dan mungkin dia berjaya dalam rayuannya terhadap keputusan ahli jawatankuasa opsyen sekiranya LP mendengarnya. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, memebenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mengmbil kira perkataan-perkataan dalam undang-undang kecil 8.2(b) dan 15.2 maksud jelas dan semulajadinya, responden mengikut persaraannya dan setelah melaksanakan haknya dengan penuh dalam tahun pertama daripada skim lima tahun tidak lagi mempunyai hak selanjutnya untuk menyertai ESOS3. Apa-apa permohonan untk menyertai selanjutnya adalah tertakluk kepada budi bicara mutlak ahli jawatankuasa opsyen, budi bicaranya tidak boleh dicabar. Ia tidak dipertikaikan bahawa responden telah bersara sebelum permulaan tahun kedua daripada lima tahun ESOS3 (lihat perenggan 16 & 21).

(2) Walaupun LP telah mendengar rayuan perayu, LP mesti mempertimbangkan dan terikat dengan perkataan-perkataan jelas undang-undang kecil. Responden mesti menunjukkan kepada mahkamah bahawa terdapat alasan kukuh bahawa pandangan LP mungkin berbeza daripada keputusan ahli jawatankuasa opsyen. Walau bagaimanapun, terkecuali untuk tuduhan-tuduhan tidak berasas, responden gagal untuk melepaskan beban pembuktian bahawa dia mempunyai peluang betul dan besar untuk berjaya dalam rayuannya kepada LP (lihat perenggan 21).]

Notes

For cases on option to purchase shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1021–1022.

Cases referred to

Mount v Baker Austin (a firm) [1998] PNLR 493, CA (refd)

Appeal from: Civil Appeal No S2–22–244 of 2007 (High Court, Seremban)

GL Ambrose (Jaclyn Chong and Adriana Leu with him) (Chooi & Co) for the appellant.

Jagjit Singh (Akberdin bin Abd Kadir and Siti Natasha with him) (Akberdin & Co) for the respondent.

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David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the learned judge's decision in allowing the respondent's claim of damages to be assessed, being his alleged entitlement in a share option scheme despite his retirement from his employment and the refusal of the ESOS committee to allow him to participate in the scheme.

[2] We heard the appeal on 20 March 2013 and after due consideration of respective submissions and perusal of the record of appeal, we allowed the appeal. The respondent has since obtained leave to appeal to the Federal Court and to facilitate that appeal we now give our grounds.

BACKGROUND FACTS

[3] The respondent was in the employment of Golden Hope Plantations Bhd ('Golden Hope') from 1 November 1991 until his retirement as its deputy general manager on 10 November 2006.

[4] Golden Hope for the benefit and welfare of its employees had a share option schemes ('ESOS') where its employees were given the option to subscribe for shares in it.

[5] Golden Hope offered the respondent to participate in an ESOS dated 26 June 2006 ('ESOS3'), whereby the respondent as deputy general manager, was granted an option to subscribe 150,000 shares over a period of five years which commenced on 8 December 2005 and ended on 7 December 2010.

[6] The first of the five year period was between 8 December 2005 and 7 December 2006. The respondent within the first period exercised his option and was allotted 30,000 shares, being the maximum allocation of 20% of the 150,000 shares allowed in by law 8.2(b) of ESOS3.

[7] On 24 January 2007, the second defendant in the High Court suit (which was struck out prior to trial) entered into an agreement with Golden Hope to acquire the entire business and undertaking, including all assets and liabilities of Golden Hope. This resulted in a merger between the second defendant and Golden Hope.

[8] On 6 June 2011, the appellant by an order of the court substituted Golden Hope as the defendant at the High Court.

[9] The respondent by a letter dated 30 April 2007 wrote to Golden Hope's

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Option Committee ('option committee') to request them to permit him to exercise the remaining options granted to him under the ESOS3 in full, ie the remaining 120,000 shares for year two to year five.

[10] The respondent's request was rejected through an Option Committee Circular Resolution dated 5 April 2007 premised on by law 15.2.

[11] Not satisfied with the decision of the option committee, the respondent by a letter dated 8 May 2007 wrote to both the BOD and option committee to appeal against the decision of rejection of the option committee.

[12] The option committee on 11 June 2007 wrote to the respondent that his appeal to the BOD had been rejected as that appeal was made out of time. Further he was informed that he had already exercised his first year entitlement in full and in view of his retirement, he was no longer eligible to participate in the ESOS.

[13] It was this refusal that caused the respondent to take this suit in which the learned High Court judge found in favour of the respondent and ordered that damages be assessed. This appeal stems from that decision.

OUR GROUNDS OF DECISION

[14] From our reading of the submission of learned counsel for the appellant, his main complaint was that the learned judge though found that the respondent was bound by the relevant by laws ignored the meanings of the same.

[15] The by laws referred to by learned counsel are 8.2(b) and 15.2 which respectively reads as follows:

(a) by law 8.2(b):

> Save as provided otherwise in these By Laws, the maximum number of Option Shares which a Grantee can subscribe for in a particular year shall be limited to twenty percent (20%) of their respective Maximum Allowable Allocation.

(b) by law 15.2:

> In the event of the ... cessation of employment of a Grantee ... for whatever reasons prior to the full exercise of an Option, such Option or the balance thereof, as the case may be, shall forthwith cease to be valid without any claim against the Company.
>
> ... the Grantee may, subject to the written approval of the Option Committee in its discretion, exercise his unexercised or partially exercised Options which

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> he is entitled to *up to that year* subject to By Law 8.2(b), within one (1) year from the date of his cessation, unless otherwise prescribed by the Option Committee, subject to such terms and conditions as may be determined or imposed by the Option Committee and subject to the written approval of the Option Committee in its discretion.
> (Emphasis added.)

[16] Giving the words contained in the two above by laws their plain and natural meanings as required by law, we find that the respondent by virtue of his retirement and having exercised his full entitlement of the first year of the five year scheme has no further right to participate in ESOS3. His right may only be exercised with the consent of the option committee whose discretion is unfettered. It is also undisputed that the respondent had retired prior to the commencement of the second year of the five year ESOS.

[17] Another complaint of the appellant was that the learned judge had stepped into the shoes of the BOD when he held that the respondent had suffered a 'loss of opportunity' when he was refused to participate in the ESOS3 and that he may have succeeded in his appeal to the BOD.

[18] It is conceded by the appellant that the respondent had appealed to the BOD within the 14 days period and the failure by the BOD to consider his appeal had prejudiced him as the BOD may have allowed his appeal. Learned counsel for the appellant had referred us to several cases on claims of losing an opportunity to pursue claim. Suffice for us to refer to the case of *Mount v Baker Austin (a firm)* [1998] PNLR 493 (CA) where Simon Brown LJ states as follows:

> The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim ..., he has lost something of value ie that his claim ... had a real and substantial rather than merely a negligible prospect of success.

[19] The learned judge with respect did not consider this principle of law correctly and if he had done so we are of the considered view that his decision would have been different. The burden is not a mere possibility of success as was found by the learned judge.

[20] We now consider the question of whether the respondent had a real and substantial chance of success in his appeal. To recap, we have pointed out earlier in our judgment that the respondent under the relevant by laws had ceased to have any more right to participate in the ESOS3 by virtue of his retirement within the first year period of 8 December 2005 and 7 December 2006.

[21] Further any application to participate as was done by the respondent is subject to the absolute discretion of the option committee. It is trite law that

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such discretion cannot be challenged, more so when it is of a private nature as opposed to a statutory discretion which is of a public nature. Hence even if the BOD hears the appeal of the respondent, they must consider and be bound by the plain words of the by laws. For the BOD to differ with the decision of the option committee, the respondent must show to the court that there are strong grounds to do so. Unfortunately except for bare allegation of discrimination, the respondent had failed to discharge this burden of proving that he had a real and substantial chance of success in his appeal to the BOD.

CONCLUSION

[22] For reasons stated above, we allowed the appeal with costs of RM10,000 to the appellant, ordered that the deposit to be refunded to the appellant and set aside the judgment of the High Court.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar